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No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OREGON, RHODE ISLAND, TENNESSEE, VERMONT, VIRGINIA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Under the federal Constitution, the general police powers — and therefore primary responsibility for protecting public health and the environment — belong to the States. This case involves a matter that lies at the core of the States' police powers: ensuring proper disposal of the garbage that their citizens produce. Unregulated garbage dumping causes air-polluting garbage and waste-tire fires, methane gas explosions, and contamination of groundwater by hazardous waste — in short, a full-blown crisis. And discarding recyclable materials needlessly reduces the supply of landfill space, driving up the cost of disposal for everyone.

Over the last few decades, the States have developed new strategies to alleviate these problems. Because poorly managed solid waste inflicts most of its harm locally, States generally vest considerable authority in local regulatory bodies, which can tailor waste-management and disposal policies to local conditions such as population density, economic considerations, and geology.

This case involves a challenge to the solid waste management plan developed by two New York counties — Oneida and Herkimer — and the Oneida-Herkimer Solid Waste Management Authority, a public benefit corporation created by New York. As part of this plan, the counties exercised their power under New York law to assume responsibility for managing all locally generated solid waste. Their local laws require that all solid waste generated within the counties be delivered to Authority-operated facilities.[1]

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1. Oneida County Local Law No. 1 of 1990, § 2(a), provides:

> In order to provide for public health and safety, and to facilitate the conservation of vital resources, each person

(Cont'd)

To encourage their citizens to minimize their use of nonrecyclables, the counties permit solid waste that can be processed at recycling or recovery facilities to be delivered free or for a nominal fee, whereas other waste is subject to a higher fee. The revenue from these fees finances waste-management programs like recycling. The "flow control" mandated by the ordinances thus plays a key role in the counties' waste-management plan.

The local laws at issue here are not unusual; at least half the States expressly authorize local governments to employ flow control restrictions.[2] But more importantly, amici States

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> shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler, or by direct haul by the individual generator to a disposal location approved by the County.

(Pet. App. 122a.)

Herkimer County Local Law No. 1 of 1990, § 2(c), provides:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(Pet. App. 135a.)

2. *See, e.g.*, Ala. Code § 22-27-3(a)(2); Ark. Code Ann. § 8-6-712(a)(1)(A); Colo. Rev. Stat. § 30-20-107; Conn. Gen. Stat. § 22a-220a; Del. Code Ann. tit. 7, § 6406(31); Fla. Stat. § 403.713; Haw. Rev. Stat. § 340A-3(a); 55 Ill. Comp. Stat. 5/5-1047; Ind. Code § 36-9-31-3(9); Iowa Code § 28G.4(4); Ky. Rev. Stat. Ann. § 109.059; Me. Rev. Stat. Ann. tit. 38, § 1304-B(2); Minn. Stat. § 115A.86; (Cont'd)

— whether or not they use flow control — are united in believing that this choice should be left to each State's legislature, which should be free to experiment with different approaches to solid waste management.

The States also are keenly interested in this case because it involves the "dormant" or "negative" implication of the Commerce Clause, which has been understood to restrict States from enacting protectionist polices that favor local private economic interests at the expense of out-of-state interests. When this doctrine is applied properly, it benefits everyone by preventing economic Balkanization of the nation. But in this case, by seeking to extinguish a State's right to supplant the private sector — which includes both local and out-of-state firms — in an area of legitimate public concern, petitioners would have this Court stretch the dormant Commerce Clause far beyond its anti-protectionist purpose. Because petitioners' approach intrudes unnecessarily on the States' sovereignty and threatens to federalize basic decisions about how the States exercise their police powers, it should be rejected and the decision below affirmed.

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Miss. Code Ann. § 17-17-319(2); N.J. Stat. Ann. § 48:13A-5; N.Y. Pub. Auth. Law § 2049-tt(3); N.C. Gen. Stat. § 130A-294(a)(5b); Ohio Rev. Code Ann. § 343.014; Okla. Stat. tit. 27A, § 2-10-901(C); Ore. Rev. Stat. § 268.317(3)-(4); 53 Pa. Stat. Ann. § 4000.303(e); R.I. Gen. Laws § 23-19-10(40); Tenn. Code Ann. § 68-211-814(b)(1)(A); Va. Code Ann. § 15.2-815; Wis. Stat. § 287.13. Some of these laws apply only to flow control to a public facility. *See, e.g.*, Del. Code Ann. tit 7, § 6406(31).

SUMMARY OF ARGUMENT

1. State laws that aim to protect public health and safety are presumptively valid under the dormant Commerce Clause. That presumption of validity applies here, because ensuring safe and responsible disposal of locally generated waste falls within the core of a State's traditional police powers. Congress confirmed this in the Resource Conservation and Recovery Act ("RCRA"), which recognizes that solid waste management should continue to be primarily a local function.

2. Unlike the town ordinance this Court invalidated in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), the local laws at issue in this case do not discriminate against interstate commerce. There is a meaningful difference between, on the one hand, laws that privilege local private firms at the expense of their out-of-state competitors, and, on the other, laws that privilege the government over all private actors, whether in-state or out-of-state. The former may be protectionist, like the town ordinance in *Carbone*, where their admitted purpose is merely to bolster a local firm's revenue. The latter, by contrast, are not protectionist, because their purpose is protecting the public from the adverse consequences that may result from private, purely profit-driven control of a service. With respect to activities such as running a lottery, selling liquor, or processing solid waste, States — and, with their permission, local governments — legitimately may use their police power to ban the private sector from offering a service the government provides. Such a decision is not subject to heightened scrutiny under the dormant Commerce Clause.

3. The counties' laws easily pass the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because they impose no qualitatively or quantitatively greater

burden on interstate commerce than on intrastate commerce. Under *Pike*, only burdens falling disproportionately on interstate commerce must be weighed against the benefits of the local law. Limiting the test in this manner ensures that it remains moored to the underlying purpose of the dormant Commerce Clause, because measures that have a disparate impact on interstate commerce without offering legitimate local benefits are likely to have protectionist purposes behind them. Petitioners' approach, by contrast, would turn *Pike* balancing into a general license for the courts to second-guess virtually any public policy judgment made by the legislature. This Court rejected a similarly open-ended interpretation of the Takings Clause in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), when it held that a law does not effect a taking merely because it does not substantially advance legitimate state interests. The Court should reach the same conclusion here with respect to the dormant Commerce Clause.

ARGUMENT

POINT I

LAWS THAT FALL WITHIN THE CORE OF STATE POLICE POWERS, LIKE THE LOCAL LAWS AT ISSUE HERE, ARE PRESUMPTIVELY VALID UNDER THE DORMANT COMMERCE CLAUSE

Although by its terms, the Commerce Clause merely grants Congress the "Power . . . To regulate Commerce . . . among the several States," U.S. Const. Art. I, § 8, cl. 3, this Court understands the Commerce Clause also to have a "dormant" or "negative" implication that curbs the power of States to regulate interstate commerce. *See Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005); *but see id.* at 439 (Thomas, J., concurring in the

judgment) ("[T]he negative Commerce Clause . . . cannot serve as a basis for striking down a state statute." (quotation marks omitted)). The dormant Commerce Clause prohibits the States from enacting protectionist measures that invite retaliatory responses from their neighbors, which if unchecked would lead to "economic Balkanization." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997) (quotation marks omitted).

But this Court has "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982). The Tenth Amendment reserves the general police powers to the States. *See Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919). Thus, when a State uses those powers to regulate "for the purpose of protecting the health of its citizens — and not simply the health of its economy," *Sporhase*, 458 U.S. at 956, there is a strong presumption that the State's actions are constitutional under the dormant Commerce Clause. *See Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality op.) (recognizing that "a State's power to regulate commerce is never greater than in matters traditionally of local concern" and that such regulations come with a "strong presumption of validity" (quotation marks omitted)).

This presumption of validity mirrors presumptions that this Court applies in other situations implicating the Tenth Amendment because they involve the balance of powers between the federal and state governments. For example, when Congress enacts positive law touching on an area of traditional state concern, there is a presumption that it does not intend to preempt state law:

> [W]e have never assumed lightly that Congress has derogated state regulation, but instead have

> addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, . . . where federal law is said to bar state action in fields of traditional state regulation, we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995) (citations and quotation marks omitted). Similarly, when "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted). Just as affirmative congressional pronouncements are tempered by a presumption that Congress would not interfere with areas of traditional state concern, Congress's silence should not be understood as casually usurping the States' traditional police powers. *Cf. Camps Newfound/Owatonna*, 520 U.S. at 572 (noting that "Congress unquestionably has the power to repudiate or substantially modify" the effects of the dormant Commerce Clause through positive legislation).

Such a presumption of validity surely applies in this case, because the power to manage the disposal of locally generated solid waste lies at the core of the States' traditional police powers. *See Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 318 (1905) (upholding against a substantive due process challenge a county ordinance that required all locally generated waste to be delivered to a public facility for cremation); *see also USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) ("For ninety years, it has been settled law that garbage collection and

disposal is a core function of local government in the United States."). This Court has long recognized that flow control has a "real, substantial relation to the protection of the public health" that justifies its restrictions. *Cal. Reduction Co.*, 199 U.S. at 320. While that analysis proceeded under the Fourteenth Amendment rather than the dormant Commerce Clause, *id.* at 317-18, its conclusion is equally applicable here. Flow control, when part of an integrated waste-management plan, is a legitimate form of "health and safety regulation," not simply "economic protectionism," *Sporhase*, 458 U.S. at 956, and thus is presumptively valid.

More recently, Congress confirmed in RCRA that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." 42 U.S.C. § 6901(a)(4). Congress had no desire to federalize control over what traditionally had been a local activity. RCRA therefore set national goals and standards, but placed primary responsibility on the States to develop solid waste management plans that promote the national goals of recycling, energy recovery, resource conservation, and environmentally sound disposal methods. *Id.* § 6943(b).

Thus, under RCRA, the States shoulder the burdens both of remediating the primitive dumps of the past and of identifying alternatives to meet their communities' needs. *Id.* §§ 6943(a)(2)-(3), 6944-6945. Congress expected that the States would use their police powers, including flow control, to meet their responsibilities for managing solid waste. *See, e.g.*, H.R. Rep. No. 94-1491, pt. 1, at 34 (1976) (explaining that RCRA "is not to be construed to affect state planning which may require all discarded materials to be transported to a particular location"), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272. In fact, Congress prohibited the States from hampering the efforts of local governments to employ tools like flow control: RCRA prohibits state barriers

that prevent local governments from "entering into long-term contracts for the supply of solid waste to resource recovery facilities . . . [or] for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste." 42 U.S.C. § 6943(a)(5).

RCRA does not, of course, authorize a State to enact protectionist legislation that intentionally discriminates against out-of-state commerce in favor of local economic interests. *See, e.g., City of Phila. v. New Jersey*, 437 U.S. 617, 629 (1978) (striking down a state law that allowed private landfills to accept in-state, but not out-of-state, waste); *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 409 (1994) (O'Connor, J., concurring in the judgment) (concluding that RCRA does not authorize protectionist waste-disposal laws that favor a single local private actor over out-of-state firms). But RCRA confirms that in the area of local waste management, the dormant Commerce Clause should not be extended beyond its core function of preventing protectionism.

That is particularly true here, because the subject of this case — a government's decision to take title to waste generated by its citizens — implicates core sovereignty interests. In *New York v. United States*, 505 U.S. 144, 175 (1992), this Court struck down federal legislation, enacted pursuant to the Commerce Clause, that infringed on this interest by forcing the State to take title to locally generated low-level radioactive waste. Just as the positive Commerce Clause powers cannot be invoked to compel the States to take title to locally generated waste, the dormant Commerce Clause does not prohibit the States from choosing to take title to that waste, provided that they do so evenhandedly.

POINT II

THE LOCAL LAWS DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE BECAUSE THEY DO NOT PRIVILEGE IN-STATE PRIVATE COMPANIES AT THE EXPENSE OF OUT-OF-STATE COMPANIES

Under the dormant Commerce Clause, a state or local law is subject to heightened scrutiny only if it intentionally discriminates against out-of-state commerce. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). A law intentionally discriminates if on its face it treats out-of-state commerce less favorably than in-state commerce, *see, e.g., Granholm v. Heald*, 544 U.S. 460, 473-74 (2005) (state law allowing in-state, but not out-of-state, wineries to ship directly to consumers), or if it has a protectionist purpose. Like any discriminatory purpose, a protectionist purpose can be demonstrated by direct evidence of motive or by circumstantial evidence, such as an overwhelmingly disproportionate effect on interstate commerce. *See, e.g., Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 351-53 (1977) (in addition to direct evidence of discriminatory intent, relying on the fact that the burden of the facially neutral regulation fell entirely on out-of-state businesses); *cf. Miller v. Johnson*, 515 U.S. 900, 913-14 (1995) (recognizing that discriminatory intent can be proved through a "stark" pattern of governmental action that is "unexplainable on grounds other than" discrimination, but that otherwise "impact alone is not determinative" (quotation marks omitted)).

Petitioners' argument that the counties' laws discriminate against interstate commerce rests on the mistaken premise that two types of governmental action are constitutionally equivalent: actions favoring local private firms at the expense

of out-of-state competitors, and actions allowing the government itself to provide a service that the private sector — both in-state and out-of-state — is prohibited from offering. Only the former are discriminatory and thus subject to heightened scrutiny under the dormant Commerce Clause.

Laws that discriminate against interstate commerce merit heightened scrutiny because they are presumed to be protectionist. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (stating that state laws that "clearly discriminate against interstate commerce" are invalid unless they can be shown to serve a purpose "unrelated to economic protectionism" (quotation marks omitted)). Unlike laws that privilege local private interests, laws that ban the private sector from offering a commodity or service that the government provides generally do not raise concerns of protectionism. Sometimes, the general welfare will be inconsistent with private, profit-driven activity. The private sector might offer an alternative that in the short term is cheaper but in the long run inflicts significant costs on the public at large, rather than a product that is pricier in the short term but mitigates the harmful and expensive long-term consequences. Allowing the private sector to operate in this situation would trigger a race to the bottom in which only the cheap, but more harmful, alternative would survive. Governments displace the private sector in these situations not simply to make money, but to promote the public interest. Because that motive is not protectionist, it does not implicate the dormant Commerce Clause. *Cf. City of Phila.*, 437 U.S. at 629 (a law that "simply prevented traffic in noxious articles" does not "discriminate against interstate commerce as such").

For example, at least forty States run state-sponsored lotteries, with some using the proceeds to support specific public purposes such as education. *See* Nat'l Conference

of State Legislatures, *Lotteries in the United States* (2004), *available at* http://www.ncsl.org/programs/econ/lotto.htm. These States generally ban private companies from running their own lotteries, because they have concluded that gambling poses risks to the public welfare — risks that can be best weighed and managed by a state-run lottery. While those legislative judgments may be debatable, and different States may balance the competing interests differently, they do not implicate the dormant Commerce Clause. *Cf. United States v. Washington*, 879 F.2d 1400, 1401 (6th Cir. 1989) (upholding a conviction based on Michigan's law banning private lotteries even though the State runs its own lottery; noting that "[i]t is rational for the Michigan legislature to choose to attack only the dangers presented by private lotteries (such as cheating, fraud, and particularly the involvement of organized crime)"). Under petitioners' interpretation of the dormant Commerce Clause, however, a State that sponsored its own lottery might be forced to legalize private gambling, too, because otherwise it would be discriminating against out-of-state gaming interests.

Similarly, more than a third of the States have chosen to ban private retail sale of some kinds of alcohol, allowing those drinks to be purchased only from state-run stores. *See* Nat'l Alcohol Beverage Control Ass'n, *Control Systems*, *available at* http://www.nabca.org/systems/index.php. Here too, States have come to different judgments about the wisdom as a policy matter of private or public retail sales. But as long as the State regulates evenhandedly — that is, does not impose greater restrictions on out-of-state beverages than on in-state beverages — the dormant Commerce Clause is not implicated. *Cf. Granholm*, 544 U.S. at 473-76 (concluding that the dormant Commerce Clause is implicated by state laws allowing in-state wineries, but not out-of-state wineries, to ship their wine directly to consumers).

By contrast, laws that privilege *private* firms, like the one at issue in *Carbone*, may raise concerns of protectionism.[3] In *Carbone*, this Court struck down a flow control ordinance requiring that all solid waste be processed at a single local, private transfer station. 511 U.S. at 386. The admitted purpose of the ordinance was discriminatory: to direct business that otherwise would go to out-of-state firms to a local commercial interest. *Id.* Although the town planned to buy the transfer station eventually, *id.* at 387, there was no reason to think that it would continue to require flow control after it took over. Flow control was not part of an integrated waste-management scheme; it was merely a way to pay off the private firm that had built the station. Because that purpose was protectionist, and because flow control advanced no legitimate governmental interests, the ordinance was invalid. *Id.* at 392.

The local laws at issue here, however, serve non-protectionist interests, and in that respect they are more similar to laws governing lotteries or the sale of alcohol than to the law struck down in *Carbone*. The counties use flow control as part of an integrated solid waste management plan. Among other things, the plan replaced "high volume, undifferentiated waste disposal methods with a system that would match the best management method to each component of solid waste"; made "waste reduction and recycling legally mandated top priorities for solid waste management"; and established and expanded markets for

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3. Those concerns would diminish, and perhaps disappear entirely, if the government selected the private firm through open, competitive bidding. *See, e.g., Atl. Coast Demolition & Recycling v. Bd. of Chosen Freeholders*, 112 F.3d 652, 663 (3d Cir. 1997) ("[A] law that directs waste to a particular facility will not necessarily violate the dormant Commerce Clause as long as out-of-state operators are given an even chance to compete for the opportunity to dispose of the state or district's waste."). That issue is not presented in this case.

recyclables (J.A. 374a). The relatively high fee for disposal of nonrecyclable waste deters residents from generating that waste (J.A. 381a-382a). Likewise, by offering free or below-market-cost services that reuse or recycle solid waste, the Authority provides an economic incentive for residents to shift toward recyclable and reusable materials (J.A. 377a-378a). The Authority accepts and recycles dozens of types of waste products, many of which are not commonly recycled by other public or private waste-management programs because of their unprofitability (J.A. 378a). Flow control plays a vital role in providing these benefits.

And unlike the *Carbone* ordinance, the counties' laws are not likely to provoke the sort of retaliatory response by other States that the dormant Commerce Clause seeks to forestall. *See Camps Newfound/Owatonna*, 520 U.S. at 577. Measures that favor a local private business implicate that concern, because if one State artificially pumps up the profits of a local business through flow control, its neighbors may feel compelled to do the same for their local businesses to keep them competitive. But municipalities that require flow control to their own public facilities potentially assume massive liability under CERCLA if the waste is not handled properly. *See* 42 U.S.C. § 9607(a); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992). They thus are likely to proceed cautiously, agreeing to take on that liability only if they have in place a comprehensive waste-management plan like the one at issue in this case — a plan whose development requires the government to commit an enormous amount of public resources. Municipalities are unlikely to expend those resources and assume liability merely to increase marginally the profits of a local private company. States or localities that choose to make waste processing an exclusively governmental service will do so because it best serves their citizens' needs, not simply as a reaction to similar laws elsewhere.

Petitioners' objection that flow control is economically inefficient because citizens may pay more per ton then they would if they could hire private haulers to dump their waste in a landfill, Petrs.' Br. at 18, misses the point of the counties' efforts here. Their goal is not simply to offer the cheapest disposal service, but to offer one with the most value. The Authority charges a higher price for processing some kinds of solid waste — and none for other services such as recycling, even though they cost more to provide — in part to encourage the counties' citizens to reduce or recycle their waste. Overall, the better services are worth the higher price. EPA Office of Solid Waste, *Flow Controls and Municipal Solid Waste* III-78 (1995) (concluding that integrated solid waste management is a "cost-effective" approach and that flow control ensures funding for the elements of a program that do not generate their own revenue, such as disposal of household hazardous waste), *available at* http://www.epa.gov/epaoswer/non-hw/muncpl/flowctrl/report/chpiii-2.pdf. And without flow control, all of the profitable waste-management business would go to private firms and the Authority would end up burdened with only the high-cost, low-revenue services like recycling.

The Authority's waste-processing service is thus quite different from the hypothetical scenarios that petitioners conjure. *See, e.g.*, Petrs.' Br. at 28, 30-31, 34-35. Those hypotheticals involve services — packaging shrimp, slaughtering meat, selling milk, manufacturing cement, and processing raw lumber — that there is no apparent reason to ban the private sector from providing. A State might choose to manufacture its own cement, for example, and even to sell it to others, but properly regulated private cement-manufacturing does not harm the public. Private waste processing is different, because it may fail to provide services such as recycling that — while unprofitable — benefit

the public. That is why waste processing is traditionally a governmental function. *See Cal. Reduction Co.*, 199 U.S. at 318.

Nor do the local laws at issue here raise the inconsistency-of-state-laws problem that plagued the local law in *Carbone*. *See* 511 U.S. at 406-07 (O'Connor, J., concurring in the judgment) (explaining that the law should be evaluated not just on its own, but also by considering how it would work if other States enacted similar laws). The *Carbone* law covered not just locally generated waste, but any waste that happened to be in the town, even if it came from out of state. *Id.* at 407. That gave rise to a real conflict: Under New Jersey law, waste could be transported to the town for processing but had to be returned for disposal, whereas under the local law, once the waste was brought in it had to remain there. *Id.* The counties' laws here, however, apply only to locally generated waste. Even if every municipality in the country enacted such laws, there would be no conflict, because waste can be generated in only one place. Because those laws are far removed from the dormant Commerce Clause's concerns about protectionism, they should not be subjected to heightened scrutiny.

POINT III

THE LOCAL LAWS PASS THE *PIKE* BALANCING TEST BECAUSE THEY DO NOT HAVE A DISPARATE IMPACT ON INTERSTATE COMMERCE

A State or local law that, while not intentionally discriminating against interstate commerce, nonetheless incidentally burdens it, is valid unless the burden clearly exceeds the law's local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *but see Am. Trucking Ass'ns,*

545 U.S. at 439 (Scalia, J., concurring in the judgment) (rejecting this aspect of the dormant Commerce Clause unless the law at issue is indistinguishable from one previously invalidated by the Court). In other words, if a law has a disparate impact on interstate commerce — imposes burdens on interstate commerce that are quantitatively or qualitatively different from those imposed on intrastate commerce — it may be invalid.

When a disparate impact cannot be justified by legitimate local interests, that suggests that the real motivation may be protectionist, thus implicating the policy behind the dormant Commerce Clause. *Cf.* Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 652 (2001) (a "leading gloss" on disparate impact liability is that it "functions as a means of smoking out subtle or underlying forms of intentional discrimination"). But if the burdens on interstate commerce are the same as those on intrastate commerce — in other words, the law burdens commerce generally but not interstate commerce in particular — then the dormant Commerce Clause is not implicated. *See Am. Trucking Ass'ns v. Schneider*, 483 U.S. 266, 283 n.15 (1987) (a "disincentive [that] affects local and out-of-state vehicles in precisely the same way . . . does not implicate the Commerce Clause"). In this situation there is no need even to inquire about the potential benefits of the law because there is no cognizable burden to weigh against the benefits under the *Pike* balancing test.

To hold otherwise would be to turn the dormant Commerce Clause into a free-ranging license to second-guess virtually any state law on the ground that it is not economically efficient — that is, that its burdens on commerce generally (not interstate commerce in particular) outweigh its benefits. That takes the doctrine far beyond its

purposes, and is precisely the sort of constitutional expansion that this Court recently rejected in the context of the Takings Clause. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In *Lingle*, the Court unanimously disclaimed language from earlier cases suggesting that a law effected a taking if it did not "substantially advance legitimate state interests." *Id.* at 531 (quotation marks omitted). It explained that this test would present "serious practical difficulties" because it

> can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations — a task for which courts are not well suited. Moreover, it would empower — and might often require — courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Id. at 544.

The same is true of an expansive interpretation of the dormant Commerce Clause. By suggesting that the courts may balance the benefits of a law against its burdens on commerce generally, even when there is no disparate impact on interstate commerce in particular, petitioners invite the courts to substitute their judgment for the state legislatures' as to a law's efficacy and desirability as a matter of policy. For example, here petitioners ask this Court to invalidate the local laws because, in their view, it is more effective to process the counties' solid waste elsewhere. Thus, in their view, a court must decide whether, as a policy matter, the benefits of the local laws for public health and the environment outweigh the economic drawbacks they

postulate. The courts are ill-equipped to handle this sort of inquiry.[4]

This Court's precedent applying the *Pike* balancing test is consistent with a narrow understanding of the burdens to be weighed. Whenever this Court has struck down a state law for burdening interstate commerce, it has identified a burden that imposes quantitative or qualitative disadvantages on interstate businesses in particular. For example, a State's idiosyncratic rule governing an activity that easily crosses state lines may impose a greater burden on businesses that compete in interstate commerce than on those that operate just in one State. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (striking down under *Pike* a state regulation limiting the length of trucks operating on highways within the State); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-30 (1959) (holding that a State could not constitutionally require a unique type of truck mudguard when such a regulation conflicted with other States' mudguard requirements); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773 (1945) (holding that a regulation limiting train lengths "materially impedes the movement of . . . interstate trains" through the States). Each of these cases involved regulations that, though equally applicable in-state and out-of-state, imposed substantial burdens on commerce traveling among the States. Because those burdens — such as shortening trains or removing mud flaps — did not affect interests acting in-state only, they gave domestic firms a competitive advantage over multi-state competitors. Similarly, *Pike* itself involved a regulation that in practice required a grower to package its produce within the State — a rule that largely affected only businesses that otherwise would have packaged their produce

4. This sort of means-ends inquiry might be appropriate in the context of a substantive due process challenge. *See Lingle*, 544 U.S. at 542. But it has little to do with preventing economic protectionism, which is the mission of the dormant Commerce Clause. In any event, petitioners do not dispute that flow control satisfies substantive due process. *See Cal. Reduction Co.*, 199 U.S. at 319-21.

out of state. 397 U.S. at 144; *cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (applying *Pike* balancing only after assuming that the out-of-state industry "is burdened *relatively* more heavily than" the in-state industry (emphasis added)).

The county ordinances at issue here easily pass a properly constrained *Pike* balancing test. Petitioners make no serious effort to show that the laws impose a quantitatively or qualitatively different burden on interstate commerce than they do on intrastate commerce. The most they claim is that the laws prohibit in-state generators and private haulers from patronizing out-of-state facilities. Petrs.' Br. at 46 n.15. But the county ordinances prohibit generators and haulers from patronizing either in-state or out-of-state non-Authority facilities. Thus, while they may well affect *commerce*, they do not impose a cognizable burden on *interstate* commerce, and they are therefore valid under the dormant Commerce Clause.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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